IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1627 OF 2004

Musthafa Ahamed Dossa ...Petitioner

vs.

1. The Joint Secretary,
Government of India,
Ministry of Finance,
Department of Revenue,
New Delhi.

2.The Inspector of Police,
PCB, CID, Crawford Market,
Mumbai.

3.State of Maharashtra ...Respondents

Shri Rizwan G. Merchant with Shri Sultan A. Khan for the Petitioner
Shri B.A.Desai, Addl.Solicitor General with Shri D.A.Nalavade and Ms Revati Mohite-Dere for the Respondent.

CORAM: SMT.RANJANA DESAI & A.S.OKA,JJ.
DATE ON WHICH PETITION WAS LASTLY HEARD: DECEMBER 21, 2004.
DATE OF PRONOUNCEMENT OF JUDGMENT : FEBRUARY 1,2005.

ORAL JUDGMENT : **(Per Abhay S. Oka,J.)**

1. The Petitioner Mustafa A. Dossa is the detenu against whom the order of detention dated 25th March 1992 has been passed under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act,1974 (for short COFEPOSA). The challenge in this Petition under Article 226 of Constitution of India is to the said order of detention passed by the Respondent No.1.

2. The impugned order dated 25th March 1992 was passed against the Petitioner with a view to preventing him from smuggling goods in future. The allegation made in the order of detention is that the Officers of Directorate of Revenue Intelligence (hereinafter referred to as DRI) at Manglore received a credible information that a truck bearing registration No.KA-25-1254 carrying contraband silver bricks would be going towards Indore after passing through Karkala from Padubidri side on 8th March 1992 at about 9.00 a.m. The Officers of D.R.I. Mangalore proceeded to the spot and started checking all the trucks passing on that route. The said Officers stopped the said truck. In the cabin of the truck there was one more person besides the driver. The driver informed the Officers of D.R.I. that his name was Rameshkumar and he was coming from Udupi and going towards Kolhapur. He stated that he was not carrying any goods in the truck. The another person in the cabin disclosed his name as Madan Singh S/o Amar Singh. The said Rameshkumar also produced certain documents showing the particulars of registered owner of the truck and the Insurance Policy. Though the driver and the said another person denied that no goods have been concealed in the cabin of the truck, when the Officers examined the cabin of the truck, they found that cabin was specially designed to carry and conceal silver bricks. The Officers found smuggled sliver bricks in gunny packages. The truck was brought to the office of D.R.I. at Mangalore. A search of the cabin of the truck showed that

there were 75 metalic bricks. One pistol was also found along with 50 live cartridges. An expert in silver was summoned who opined after testing the silver bricks that the same were made of silver of 999 purity. The total weight of the silver bricks was found to be 2676.394 kgs. The expert opined that the silver bricks are of foreign origin. The approximate value of the said silver bricks was 2,14,11,152/- and the cost of pistol and 50 cartridges was Rs.41,180/-. The said silver bricks and pistol were smuggled into India in violation of provisions of Customs Act,1962. Along with the silver bricks one Pistol and 50 live cartridges were also seized.

3. The D.R.I. Authorities recorded a statement of one Abdul Khader of Uchila under Section 108 of the Customs Act,1962. He stated that he was doing smuggling for last 25 years and for last 5 years he was working with the gang headed by the Petitioner who was also known as Tiger Musthafa or Manju Musthafa. At the relevant time the Petitioner was at Dubai from where he was sending gold regularly to the Indian coast. In the said statement, Abdul described the manner in which silver bricks were smuggled in India. The statement of Tanaji Kanchan was also recorded on 9th March 1992. under Section 108 of Customs Act, 1962. He stated that he was working with Abdul Khader of Uchila. He described the various acts of smuggling of silver. Similarly, a statement of one Raghunath Kotian was also recorded on 9th March 1992 under Section 108 of Customs Act, 1962. Rameshkumar, the driver of the truck

also gave a statement under Section 108 of Customs Act,1962 describing in detail as to how he met Abdul Khader at Uchila and as to how he was given a truck in which 75 silver bricks were concealed. A statement of Madan Singh was also recorded. After having considered the statements, the Respondent No.1-detaining authority recorded subjective satisfaction that the Petitioner was engaged in smuggling goods into India. Further satisfaction was recorded that the Petitioner was likely to indulge in prejudicial activities in future and therefore, it was necessary to detain the Petitioner under COFEPOSA.

4. Respondent No.3-State of Maharashtra also passed an order of detention dated 30th January 1996 against the Petitioner under Section 3(1) of COFEPOSA. It must be noted here that after the impugned order of detention was passed, the Petitioner absconded. He went to Dubai. The Petitioner was brought to India only in March 2003 as an offence in serial Bomb Blast was registered against the Petitioner and others under TADA Act and was detained in Mumbai. The impugned order of detention provided that the Petitioner shall be kept in Central Prison at Bangalore. The Petitioner was served with order of detention dated 30th March 1996 after he was brought to India in connection with the Bomb Blast cases. The case of the Petitioner was placed before the Advisory Board. The Advisory Board was of the opinion that there was no sufficient cause for detention of the Petitioner. The State of

Maharashtra acting on the opinion of the Advisory Board revoked the order of detention dated 30th January 1996. There was one more order of detention passed by the State of Maharashtra against the Petitioner on 28th August 1992 under the provisions of COFEPOSA. According to the Petitioner, he was not made aware about the said order of detention. However after he was served with the order of detention dated 30th January 1996 passed by the State of Maharashtra, he became aware about the order dated 28th August 1992 passed by the State of Maharashtra. Before execution of the order dated 30th January 1996 the Petitioner by his letter dated 5th April 2003 sent on his behalf by Shri Qureshi M. Attal, Advocate addressed to the Under Secretary of Home Department, Mantralaya, Mumbai, informed the State Government that the Petitioner was in custody for a period of two weeks in Arthur Road jail. By the said letter it was informed that if any detention order was pending against the Petitioner, the Department was at liberty to execute the said detention order either at CBI office or at TADA Court after adopting proper legal procedure. The case of the Petitioner is that only after the said letter was sent by his Advocate, he was served with the order dated 30th January 1996.

5. The Advocate for the Petitioner Shri R.G.Merchant by his letter dated 17th December 2003 addressed to the Principal Secretary to the Government of Maharashtra and the Respondent No.2 herein i.e. Inspector of Police, PCB CID, Mumbai brought

to their notice that the order of detention dated 28th August 1992 passed by the State Government against the Petitioner was pending for execution. By the said letter, the concerned Authorities were requested to take steps to ensure immediate execution of the said order. It is the case of the Petitioner that from the documents supplied to the Petitioner along with order of detention dated 30th January 1996 the Petitioner came to know that the impugned order of detention has been passed by Respondent No.1 on 25th March 1992. Therefore, by a letter dated 17th December 2003 sent on behalf of the Petitioner by his Advocate addressed to the Respondent No.1, the Respondent No.2, Deputy Director, Directorate Revenue Intelligence, Mangalore, Deputy Director, Revenue, Directorate of Intelligence, Colaba, Mumbai, the Authorities were called upon to take immediate steps to execute the impugned order. According to the Petitioner an Application being Misc. Application No.11 of 2003 was made before the designated Court under TADA Act through Mumbai Central Prison, Mumbai in pending case bearing BBC-1-A of 1993. In the said Application, the Petitioner prayed for direction from TADA Court to the Respondents in the said application to serve orders of detention issued in the year 1992 by Respondent No.1 and Respondent No.3. An Affidavit-in-reply was filed to the said application before the TADA Court by Shri Ramesh Shinde, a Deputy Secretary to the Government of Maharashtra, Home Department, Mantralaya, Mumbai. In the said Affidavit-in-reply it was stated that the order dated 28th

August 1992 passed by the State Government has been revoked on 27th January 2004. A copy of order dated 27th January 2004 was annexed to the Affidavit-in-reply. In the said order dated 27th January 2004 it was stated that State Government was of opinion that no purpose will be served by executing the detention order dated 28th August 1992. In the said order it was noted that the Petitioner was under judicial custody of the designated Court under TADA Act.

6. The Petitioner made representation dated 6th February 2004 addressed to Respondent No.1 calling upon Respondent No.1 to revoke the impugned order of detention. In the said representation which was made by the Petitioner through his Advocate, a reference was given to the order passed by the State Government on 27th January 2004 by which order of detention dated 28th August 1992 was revoked. Similarly, a representation was made by the Advocate appearing for the Petitioner on 10th February 2004 which was addressed to Respondent No.1. Reliance was placed in the said representation on a decision of Kerala High Court. The Advocate for the Petitioner made further representation dated 11th March 2004 pointing out that no reply was sent by Respondent No.1 to earlier representations. It was pointed out that if no steps were taken by Respondent No.1, the Petitioner will approach the Hon'ble High Court by filing a Writ Petition. The Petitioner on 7th April 2004 filed Criminal Writ Petition No.667 of 2004 in this Court inter alia

for quashing and setting aside the impugned order of detention on the ground of delay in execution of the said order. According to the Petitioner a copy of Writ Petition was sent to office of Respondent No.1 on 8th April 2004. The said Writ Petition came before the Division Bench of this Court on 12th April 2004, when the learned Counsel for the Respondents in the said Writ Petition took time for taking instructions. On 24th April 2004 the impugned order of detention was served on the Petitioner. As the impugned order was served on the Petitioner, the said Writ Petition was disposed by the Division Bench of this Court by order dated 26th April 2004.

7. The Petitioner has challenged the order of detention by filing this Writ Petition on various grounds set out in the Petitioner. The Petitioner contended that there was a gross delay in execution of the order of detention. It is also contended in the Petition that before execution of the impugned order of detention, the detaining authority has not recorded satisfaction that there was imminent possibility of the Petitioner being released on bail in the case under TADA Act under which he was in custody and that looking to the propensity and potentiality of the Petitioner, no satisfaction has been recorded that the impugned order of detention was required to be given effect to even after lapse of period of 12 years from the date of passing the impugned order. There was a gross delay in considering the representations dated 6th February 2004, 10th February 2004 and 11th March 2004 praying

for revocation of impugned order. The Petitioner has also made grievance about non-placement of translation of endorsements in Kannada language on certain documents placed before the detaining authority and therefore, there was non-application of mind. It is also submitted that non-supply of translation of the said endorsements to the Petitioner in Urdu language has resulted in breach of fundamental rights guaranteed under Article 22(5) of Constitution of India. The Petitioner urged that non-supply of translation in Urdu language of the said documents prevented the Petitioner from making effective representation against the order of detention. Lastly, it is contended that certain documents which were placed before the detaining authority came into existence on 24th March 1992 and therefore, while passing the order of detention on 25th March 1992 there was no sufficient time available to the detaining authority to apply his mind to the said documents.

8. The Respondent No.1 has filed Affidavit-in-reply and opposed the Petition. In the Affidavit-in-reply Respondent No.1 has described the Petitioner's prejudicial activities of smuggling. In the said Affidavit-in-reply and in particular paragraph No.3 thereof Respondent No.1 has set out various dates and events leading to passing the order of detention and execution of the order of detention. It is submitted in the Affidavit-in-reply that a Notification under Section (7) (b) of the COFEPOSA was issued on 3rd June 1992 and Red Alert

No.30A/1192 was issued against the Petitioner on 10th July 1992. Respondent No.1 stated that since the Petitioner absconded and was out of India, order of detention could not be executed. It was stated that the Petitioner was declared as having absconded and was brought to India only in March 2003 as an accused in serial Bomb Blast case and was lodged in Central Prison, Mumbai. It was contended that since the impugned order of detention requires the Petitioner, to be detained in Bangalore Prison the same could not be executed. It is the case of Respondent No.1 that in Criminal Writ Petition No.667 of 2004 which was filed by the Petitioner on 12th April 2004, the Division Bench of this Court directed the Respondents to execute the order of detention. Respondent No.1 contended that considering the peculiar facts of the case there was no unexplained delay in executing the order of detention. Respondent No.1 relied upon the order dated 22nd April 2004 passed by him which shows awareness about the judicial custody of the Petitioner in TADA case and by the said order, detention of the Petitioner under the impugned order was directed to be made in the Central Prison at Mumbai instead of Central Prison at Bangalore.

9. It is stated in the Affidavit-in-reply that representations made by the Petitioner through his Advocate were duly considered and a reply was sent to the Petitioner and his Advocate on 24th March 2004. It is stated in the Affidavit-in-reply that delay in execution of the said order

was as a result of recalcitrant or refractory conduct on the part of the Petitioner. In paragraph No.9 of the reply it was stated that during the period when the Petitioner was absconding, he repeatedly indulged in smuggling of foreign exchange and Indian currencies and was involved in serial Bomb Blast case in the year 1993. It was stated that live link between the grounds of detention and purpose of detention is not snapped due to delay in service of detention order. It is submitted in the reply that the endorsement in Kannada language on certain documents was inconsequential and same does not affect the application of mind by the detaining authority. It is stated that the documents at page Nos.101 and 123 and 124 of compilation of documents supplied to the Petitioner were not material documents which could have affected the subjective satisfaction of the detaining authority. It is stated in the reply that translation of all the relevant documents in Urdu language was served on the Petitioner on 21st May 2004. The Respondent No.1 stated that the Petitioner had knowledge of both Hindi and English languages. It is stated that the documents dated 24th march 1992 were considered by the detaining authority. The said documents did not require much time for consideration. Lastly, it is stated that the Petitioner had ran away from the country after passing of the order of detention and has been indulging in several illegal activities with the help of his associates inside and outside the country. The Petitioner and his associates were running smuggling racket by placing

themselves in Dubai and if the Petitioner was allowed to escape the same will be jeopardise the country's economy.

10. Shri Merchant, learned Counsel for the Petitioner and Shri B.A.Desai, Additional Solicitor General have made extensive submissions before us. Both of them have also tendered their respective written submissions for our consideration.

11. Shri Merchant, learned Counsel for the Petitioner submitted that though the Respondents were aware that the Petitioner was in judicial custody of the TADA Court in the Bomb Blast cases, no steps were taken for service of impugned order of detention. Apart from sending letters to various authorities, the Petitioner filed an application on 2nd January 2004 before the designated Court under TADA Act seeking directions against Respondent Nos.1 and 2 to execute the orders of detention passed by the Respondent No.1. The State Government responded to the said application by filing Affidavit bringing on record that the order of detention dated 28th August 1992 passed by the State Government has been revoked. However, Respondent No.1-Union of India even after service of the said application did not file any reply before the TADA Court and did not execute the order of detention. After making the said application three representations were made, last of which was of 11th March 2004 addressed to Government of India praying for revocation of impugned order.

Inspite of the service of representations no efforts were made to execute the said order of detention. He submitted that Cri.W.P.No.667 of 2004 was filed on 7th April 2004 and even thereafter there was long delay of 17 days in executing the order. He also relied upon certain facts disclosed in the Affidavit-in-reply of Respondent No.1 filed to this Petition. He pointed out that in chronology of the dates and events given in paragraph No.3 of the Affidavit, it is stated that on 3rd April 2003 a letter was sent by Directorate of Revenue Intelligence to the Commissioner of Police, Mumbai asking the Commissioner whether the detention order against the Petitioner was executed after his repatriation from Dubai to India. He pointed that there is a reference in the said chronology to the letter of the Deputy Commissioner of Police, Crime Branch, Mumbai stating that the Petitioner was in Central Prison in connection with Bomb Blast cases. The said letter was sent on 17th November 2003. He therefore submitted that the delay in execution of the impugned order will have to be calculated from 3rd April 2003 when the aforesaid letter was written by DRI. He submitted that there is a gross delay of more than one year in executing the order. He submitted that there was no reply filed either by the Sponsoring Authority or by the Respondent No.2 who was the executing authority. He submitted that there was no explanation in the Affidavit-in-reply of Respondent No.1 for the delay. Shri Merchant relied upon the decisions of Apex Court reported in **2000 S.C.C. (Criminal) page No.411 (A. Mohammed Farook Vs.**

Joint Secretary to the Government of India and others) and 1999 S.C.C. (Cri.) page No.498 (Manju R. Nahar Vs. Union of India) in support of his submissions.

12. Shri Merchant further submitted that as the impugned order of detention was sought to be executed after twelve years in the year 2004, before executing the order, the detaining authority ought to have applied his mind and ought to have recorded subjective satisfaction that there was imminent possibility of his release on bail and that looking to his propensity and potentiality, the detaining authority was satisfied that after twelve years, the impugned order deserves to be given effect to and satisfaction which existed in 1992 about the detenu being likely to continue his prejudicial activities was existing even in the year 2004. He stated that in the Order dated 22nd April 2004 passed by the detaining authority no such satisfaction has been recorded. In continuation of the said submission he stated that before execution of the order, the detaining authority ought to have recorded a reasoned satisfaction for continuing with the impugned order. Shri Merchant relied upon the decision of Apex Court reported in **(1986) 4 S.C.C. page No.416 (Binod Singh Vs. District Magistrate and others)**.

13. He submitted that the representations made by the Petitioner through his Advocate on 6th February 2004, 10th February 2004 and 11th March 2004 were disposed of only on

24th March 2004. He stated that there was a gross and unexplained delay in deciding the representations. He submitted that no explanation was forthcoming for the said delay in the Affidavit-in-reply.

14. He submitted that the executing authority i.e. the Respondent No.2 was aware that the Petitioner was conversant only with Urdu language. He submitted that Respondent No.2 has not performed his mandatory duty of explaining to the Petitioner in Urdu language the contents of the orders of detention at the time of service of the order. He, therefore, submitted that fundamental rights of the Petitioner guaranteed under Article 22(5) of Constitution of India have been violated.

15. He submitted that there was a delay of one month in supplying the translation in Urdu language to the Petitioner of the order of detention, grounds of detention and documents relied upon in the order of detention. He submitted that the translation in Urdu language of the said documents was served on the Petitioner on 21st May 2004 i.e. nearly one month after the order of detention was executed. He, therefore, submitted that there was an infringement of the right conferred on the Petitioner by Article 22(5) of Constitution of India as the Petitioner was prevented from making effective representation. He lastly submitted that the detaining authority has relied upon the documents at page Nos.140, 141

and 142 in the compilation of documents supplied to the Petitioner and the said documents had come into existence only on 24th March 1992. He pointed out that the order of detention was passed on 25th March 1992. He submitted that there was no sufficient time for the detaining authority to apply his mind to the said documents before passing the order of detention and therefore subjective satisfaction of the detaining authority has been vitiated.

16. Shri Desai, learned Additional Solicitor General appearing for Respondent No.1 submitted that the Petitioner cannot rely upon the observations of the Apex Court as if the said Judgments were statutes. He relied upon the decision of the Apex Court reported in **(2004) 3 S.C.C. page No.75 (Union of India Vs. Amritlal Manchanda and another), 1991 Cri.L.J. page No.2058 (Kamarunnissa Vs. Union of India and another) and Judgments Today 2004 (8) S.C.Page No. 383 (T.P.Moideen Vs. Government of Kerala and others)** in support of his contention that various Judgments of the Apex Court will have to be appreciated taking into account the facts of the respective cases before the Apex Court. He submitted that the facts of the present case were unique which cannot be compared with other cases. He submitted that the detention order could not be executed only because the Petitioner ran way from India. While he was abroad, he continued to carry on his nefarious activities. He submitted that merely because the State Government revoked the orders of detention passed by the

Petitioner, the impugned order of detention cannot became bad. He submitted that the detaining authority appointed by Union of India has considered the magnitude of the prejudicial activities of the Petitioner and passed the order of detention after recording subjective satisfaction. He pointed out that the orders of detention passed by the State Government were concerning different prejudicial activities of the Petitioner. He submitted that the detenu was involved in serial Bomb Bast case in the year 1993 arising out of Bomb Blasts in Mumbai killing more than 300 persons. He pointed out that the nefarious activities of the Petitioner of indulging in smuggling were continued even after he ran away to Dubai. He stated that the Petitioner was the principal accused in the Bomb Blast cases pending before the designated court under TADA Act. He submitted that till the time the order of detention was not served upon the Petitioner, there was no question of violation of the constitutional protection. He submitted that the constitutional safeguards under Article 22(5) of Constitution of India will come to the help of the Petitioner only after the execution of the order of detention and not at any time prior thereto. He submitted that neither the Constitution nor COFEPOSA stipulated any period for execution of the order of detention.

17. The learned Additional Solicitor General submitted that alleged delay in execution of the detention order has been satisfactorily explained. He submitted that on 12th April

2004 in Criminal Writ Petition No.667 of 2004 filed by the detenu, the Division Bench of this Court orally directed Respondent No.1 to execute the impugned order of detention within period of two weeks. He stated that pursuant to the said direction the order of detention was modified on 22nd April 2004. He submitted that the Petitioner was declared as absconder under the provisions of COFEPOSA. He stated that considering the representations made by the Petitioner and the application made by him before the designated Court under TADA Court, intricate legal question arose as to whether the detention order could be served or not. He stated that considering the questions raised by the Petitioner himself, it became necessary for the Respondent No.1 to refer the matter to Law Ministry, Government of India for legal opinion. He stated that the opinion was finally received from the Law Ministry on 22nd March 2004. The Respondent No.1 as directed by the Law Ministry also forwarded the matter to the Home Ministry and after considering the opinions of the Ministries including the Judgment of Kerala High Court relied upon by the Petitioner, the detaining authority rejected the representations on 24th March 2004. The learned Additional Solicitor General has placed on record Xerox copies of the notings made by officers of Union of India which shows that the representations made by the Petitioners were considered at various levels. He submitted that Respondent No.1, as a result of various representations received by the Petitioner, adopted cautious approach and he was required to refer the

matter to the Law Ministry for opinion before taking decision on the representations.

18. He submitted that the Petitioner cannot take advantage of his own wrong and the detention order which was valid when passed cannot be rendered invalid on account of his own conduct. He submitted that the live link between the prejudicial activities and order of detention was not snapped. Relying upon the Judgment of the Apex Court reported in **1992 (1) SCC page No.434 (P.U.Iqbal Vs. Union of India and Others),** he submitted that the detaining authority was not guilty of indolence and lack of seriousness. He submitted that in any event Respondent No.1 has explained the alleged delay satisfactorily.

19. Shri Desai, learned Additional Solicitor General further relied upon the Judgment of the Apex Court in case of **T.P.Moideen Koya** (supra) and submitted that the Judgment of Apex Court in case of **Binod Singh** (supra), has no application to the facts of the present case. He also relied upon the Judgment of the Apex Court reported in **1964 (4) S.C.R. page No.921 (Rameshwar Shaw Vs. District Magistrate and others).** He submitted that the order dated 22nd April 2004 passed by the detaining authority shows awareness of the fact that the Petitioner was in jail and the said order shows fresh application of mind and the subjective satisfaction of the detaining authority before the execution of the order. He

submitted that in a case under TADA Act accused can be always released on bail and therefore the Petitioner may apply for bail at any stage. He submitted that as there was possibility of the Petitioner being released on bail by the designated Court under TADA Act, after considering all the aspects, the detaining authority has passed the order on 22nd April 2004 modifying the earlier order of detention by changing the place of detention to Central Prison at Mumbai.

20. Shri Desai further submitted that endorsements on certain documents in Kannada language are not really material. He stated that considering the nature of the documents which came into existence on 24th March 1992, it was obvious that the detaining authority was in position to apply its mind to the same within no time. He submitted that the Petitioner has stayed abroad for such a long time and it is not his case that he does not know English. He submitted that considering the special features of the present case, no interference is called for in the Petition under Article 226 of Constitution of India.

21. In reply to the submissions of the learned Additional Solicitor General, Shri Merchant, learned Counsel for the Petitioner submitted that Respondent No.1 has not disclosed in his Affidavit-in-reply the fact that opinion of the Law Ministry was taken. He submitted that it was the responsibility of the Sponsoring Authority and the executing

authority to file Affidavits explaining the delay in execution of the order. He submitted that the decision of the Apex Court in case of **Binod Singh** (supra) is neither overruled nor distinguished in case of **T.P.Moideen Koya** (supra) and the said case is decided in the light of peculiar facts before the Apex Court. He submitted that in fact, in the said decision the Apex Court has reaffirmed the view taken in the case of **Binod Singh**. He submitted that even assuming that the Law Ministry gave opinion on 22nd March 2004, still there was a delay of one more month in executing the order. He pointed out that this Court has not passed any order on the Petition filed by the Petitioner on 12th April 2004 and the Petition was simpliciter adjourned on that day. The learned Additional Solicitor General clarified that the Counsel appearing for Respondent No.1 communicated to Respondent No.1 by a letter the oral directions of this Court to execute the order of detention against the Petitioner within two weeks. Shri Merchant, learned Counsel for the Petitioner further submitted that considering the failure of Respondent No.1 to explain the delay, the order of detention is required to be quashed and set aside.

22. We have carefully considered the oral submissions of both the learned Counsel. We have perused the written submissions submitted by the parties as well as various decisions cited by the Counsel appearing for the parties.

23. Before we deal with the submissions which are made by the Counsel appearing for the parties, it is necessary to refer to the Judgment of the Apex Court in case of **Amritlal Manchanda** (supra). In the said decision the Apex Court has dealt with the purpose of preventive detention. In paragraph No. 9 of the said decision, Apex Court held thus :

> "...Preventive detention is an anticipatory measure and does not relate to an offence, while criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the executive is convinced that such detention is necessary in order to prevent the person detained from acting in a manner prejudicial to certain objects which are specified by the law concerned. The action of the executive in detaining a person being only precautionary, normally the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay down objective rules of conduct in an exhaustive manner, the failure to conform to which should lead to detention. **The satisfaction of the detaining authority, therefore, is considered to be of primary importance, with**

great latitude in the exercise of its discretion. The detaining authority may act on any material and on any information that it may have before it. Such material and information may merely afford basis for a sufficiently strong suspicion to taken action, but may not satisfy the tests of legal proof on which alone a conviction for offence will be tenable. **The compulsions of the primordial need to maintain order in society without which the enjoyment of all rights, including the right to personal liberty of citizens would lose all their meanings, provide the justification for the laws of preventive detention.** Law that provide for preventive detention posit that an individual's conduct prejudicial to the maintenance of public order or to the security of State or corroding financial base provides grounds for satisfaction for a reasonable prognostication of possible future manifestations of similar propensities on the part of the offender. This jurisdiction has at times been even called a jurisdiction of suspicion. The compulsions of the very preservation of the values of freedom of democratic society and of social order might compel a curtailment of individual liberty, "To lose our country by a scrupulous adherence to the

written law" said Thomas Jefferson "would be to lose the law itself, with life, liberty and all those who are enjoying with us, thus absurdly sacrificing the end to the needs.: This, no doubt, is the theoretical jurisdictional justification for the law enabling preventive detention. But the actual manner of administration of the law of preventive detention is of utmost importance. **The law has to be justified by striking the right balance between individual liberty on the one hand and the needs of an orderly society on the other."** (emphasis supplied)

In the said decision Apex Court also considered the law of precedent and proceeded to observe in paragraph Nos. 15,16 and 17 as under :

"15. Cases involving challenges to orders of detention before and after execution of the order stand on different footings. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid’s theorems nor as provisions of the statute and that too taken out of their

context. **These observations must be read in the context in which they appear to have been stated. Judgments of courts are not be construed as statutes.** To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not be interpreted as statutes. In London Graving Dock Co. Ltd. V. Horton (AC at p. 761) Lord Macdermott observed:

(All ER p. 14 C-D)

"The matter cannot of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge...."

16. In Home Office V. Darset Yacht Co. Lord Reid said (at All ER p. 297-h), "Lord Atkin's speech... is not be treated as if it were a statutory definition. It will require qualification in new circumstances.: Megarry, J.

in (1971) 1 WLR 1062 observed : "One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament." And, in Herrington V. British Railways Board Lord Morris said: (All ER p. 761 c).

. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case.

17. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

(emphasis supplied)

24. The first contention of Shri Merchant, learned Counsel for the Petitioner is regarding delay in execution of the impugned Order. It is not in dispute that after the order of detention was passed, the Petitioner left India and was brought back from Dubai to India only in March 2003. In the meanwhile, the Petitioner was declared as absconder by passing

order Under Section 7(1)(b) of COFEPOSA. In the case of **Bharwalal Ganeshmalji Vs. State of Tamilnadu reported in AIR (1979) 1- SC page No.465** Apex Court considered the effect of delay in executing the order of detention when the delay was caused due to abscondence of the detenu. In paragraph No.6 of the said decision, Apex Court held as under :

> "....But where the delay is not only adequately explained but is found to be result of the recalcitrant or refractory conduct of the detenu in evading arrest, there is warrant to consider the 'link' not snapped but strengthened. That, precisely, is the state of affairs before us. The order of detention was made on December 19, 1974. The detenu was found to be absconding. Action was taken pursuant to Section 7 of the COFEPOSA and he was proclaimed as a person absconding under Section 82 of the Criminal Procedure Code. The proclamation was published in several leading English and local language daily newspapers. His photograph was exhibited in cinema halls. A reward of Rs.5,000/- was also announced for his apprehension. Despite all this effort he could not be arrested until he surrendered on February 1, 1978. We do not have any hesitation in overruling the submission of Shri Jethmalani based on the delay in the

execution of the order of detention."

25. In the present case the Petitioner evaded execution of the order by running away from the country. The Petitioner is allegedly involved in serial Bombay Bomb Blasts cases of the year 1993 and for the said cases he was brought from Dubai and was placed in judicial custody of the designated court under the TADA Act. Therefore, it is very clear to us that recalcitrant or refractory conduct of the detenu resulted in non execution of the order at least till March 2003. In so far as further delay is concerned, in paragraph No.6 of the Affidavit-in-reply the Respondent No.1 has set down the events which have taken place till date of execution of the order against the Petitioner. Before we consider the explanation, if any, for the delay and the consequence of delay, it is to be borne in mind that the order of detention has been passed under COFEPOSA. In Rajendrakumar Natwarlal Shah Vs.State of Gujrat reported in A.I.R. 1988 S.C. page No.1255, the Apex Court held that,

"It has been laid down by this court in series of decisions that the rule as to unexplained delay in taking action is not inflexible. Quite obviously in cases of mere delay in making an order of detention under a law like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 enacted for the purpose of dealing effectively with persons

> engaged in smuggling and foreign exchange racketeering who owing to their large resources and influence have been posting a serious threat to the economy and thereby to the security of the nation, the court should not merely on account of delay in making of an order of detention assume that such delay if not satisfactorily explained must necessarily give rise to an inference that there was no sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. Taking of such a view would not be warranted unless the court finds that the grounds are stale or illusory or that there is no real nexus between the grounds and the impugned order of detention."

The Apex Court in another decision reported in A.I.R. 1990 S.C. Page 1446 (Abdul Salam Vs. Union of India) has observed that,

> "That apart, we are unable to agree with the learned counsel that because of this delay the necessary nexus got severed and that the grounds have become stale and illusory. In appreciating such a contention, the court also has to bear in mind the nature of the prejudicial activities indulged by the detenu and the likelihood of his

repeating the same. It is this potentiality in him that has to be taken into consideration and if the detaining authority is satisfied on the available material, then on mere delay as along as it is not highly unreasonable and undue the Court should not normally strike down the detention on that ground".

26. In this behalf it will be necessary to refer to the view taken by the Division Bench of this Court, in the decision reported in **1998 (2) Mh.L.J. page No.496 (Rafiq Abdul Karim Vs. Rajendra Singh)**. In the said decision the issue before the Division Bench was regarding the effect of delay of more than seven months in issuing the order of detention. The question before the Division Bench was that on account of delay of more than seven months in issuance of detention order whether the live link between the prejudicial activities of the detenue and rationale of clamping a detention order on him did not get snapped so as to vitiate the order of detention. After considering the decision of the Apex Court in the case of **Hemlata reported in 1981 (4) SCC page No.647**, Division Bench held that in case of preventive detention under COFEPOSA or PITNDPS even unexplained delay in issuance of detention order by itself would not vitiate the same. The Division Bench held that in such a case the order of detention will be vitiated only if on account of delay, the live link between the prejudicial activities of the detenu and rationale of

clamping a detention order is snapped. The Division Bench also held that while dealing with the preventive detention under COFEPOSA question of delay in issuing the detention order cannot be approached with same sensitivity and strictness as in case of detention order under the National Security Act. In paragraph Nos. 10-A and 11 of the Division Bench held as under :

> "10-A But in a case of preventive detention under the COFEPOSA or PITNDPS even unexplained delay in the issuance of the detention order, by itself would not vitiate the same. In such cases it will only be vitiated if on account of delay the live-link between the prejudicial activities of the detenu and the rationale of clamping a detention order on him is snapped.
>
> . For determining whether such a live link has been severed or not, the propensity and potentiality of the detenu to commit prejudicial activities would be very material. If there is no material to indicate that the detenu had propensity and potentiality to commit them, unexplained delay simpliciter in the issuance of the detention order would be fatal and the same would be vitiated because the live-link between the prejudicial activities of the detenu and the

rationale of clamping a detention order on him would be snapped.

. On the converse if there is material to show that the propensity and potentiality of the detenu to commit prejudicial activities was there then despite the unexplained delay in the issuance of the detention order the live-link between the prejudicial activities of the detenu and the rationale of clamping a detention order on him would not be lost and the detention order would not be vitiated.

11. We wish to emphasise the question of delay in issuing a detention order cannot be approached with the same sensitivity and strictness in case of a preventive detention under the COFEPOSA or PITNDPS, as in a case under the National Security Act. A wider margin has to be given to the authorities in cases under the COFEPOSA and PITNDPS." (Emphasis supplied)

27. We are of the view that in the facts of this case there is no reason why the same principles should not govern a case where the issue is regarding delay in execution of order of detention passed under COFEPOSA. In our view in case of preventive detention under COFEPOSA, even unexplained delay in

issuance of detention order by itself will not vitiate the order. Only in case where on account of delay, the live-link between the prejudicial activities of the detenu and the necessity of clamping the detention order on him is snapped, the delay will vitiate the order. If there is material to show that propensity and potentiality of the detenu to commit prejudicial activities was there even on the date of execution of the order then despite the unexplained delay in issuance of detention order the live-link between the prejudicial activities of the detenu and rationale of clamping the order of detention will not be lost. In the Affidavit-in-reply of the Respondent No.1, it is stated that while in Dubai also the Petitioner continued his prejudicial activities.

28. The second submission of Mr.Merchant is that no satisfaction has been recorded by the detaining authority that looking to the propensity and potentiality of the detenu, the detaining authority was still satisfied that effect should be given to the order of detention after lapse of twelve years. This submission will have to be considered with the first submission. The order dated 22nd April 2004 passed by the detaining authority reflects the awareness of the subsequent event of lodging of the Petitioner in Central Prison in Mumbai in connection with the case of serial Bomb Blast of the year 1993. The said order shows that the detaining authority was of the view that there was a security threat if the Petitioner is detained at Bangalore and was required to bring to Mumbai

in connection with the hearing of TADA case in Mumbai. The order dated 22nd April 2004 shows that there was a fresh application of mind by the detaining authority just before execution of the order. In this connection, it will be necessary to refer to certain portions of the Affidavit-in-reply filed by Respondent No.1. In paragraph No.5 on page No.94 it is stated in the reply as under :

> "....The petitioner has indulged continuously in several illegal activities including smuggling of silver, India/foreign currency and was also involved in Serial Bombay Blast Cases even after the issuance of the impugned order of detention. I therefore submit that execution of the detention order is justified by the subsequent conduct of the petitioner."

In paragraph No.9 the detaining authority has stated as under :

> "9. With reference to Para 6(i) of the Petition, I further state that the conduct and activities of the Petitioner clearly shows that there is live link between the Detention Order and the prejudicial activities of the Petitioner. Moreover the Petitioner had absconded and thereby run away from the clutches of law of this country

> and during this period of absconding had also repeatedly indulged in several activities of smuggling of silver, foreign and Indian currencies and was also involved in serial Bombay Bomb Blast cases under Tada Act. .....I reiterate that there has been no live link snapped with regard to the service of Detention Order on 24th April 2004.
>
> .....I state that since the Petitioner himself had absconded and consciously remained at large and had even during this period absconded and had indulged in various prejudicial and nefarious activities, the Petitioner now cannot turn around and contend that the live link is snapped on account of delay in serving the Detention Order."

There is no rejoinder filed to the said Reply. The assertions made in the reply show that the Petitioner continuously indulged in nefarious activities while he was in Dubai. Therefore, it is not possible to accept the argument that the live link was snapped.

29. As held by us earlier only unexplained delay is not a ground by itself to vitiate the order of detention under COFEPOSA. However, Mr. Merchant has made a submission that there is a failure on the part of the Respondents to explain

the delay and therefore, we have considered the said submissions. He placed reliance on a statement made in chronology of events set out in paragraph No.6 of the Affidavit-in-reply which shows that a letter was sent by the Directorate Revenue Intelligence to the Commissioner of Police on 3rd April 2003 asking the Commissioner whether the detention order against the Petitioner has been executed in the light of his repatriation from Dubai to India. It is not clear whether the reference in the said letter is to the order of detention passed by the State Government under COFEPOSA or to the impugned order of detention. There is nothing on record to show that the said letter is concerning the impugned order of detention. As stated earlier, in the year 1992 there was one more order of detention under COFEPOSA passed by the State Government. The description of the said letter in paragraph No.6 of the reply is not sufficient to come to the conclusion that by the said letter the Commissioner of Police was made aware about the impugned order of detention. In so far as Item No.43 in paragraph No.6 of the Affidavit-in-reply is concerned, much emphasis was led by Shri Merchant. Item No.43 is a letter sent by the Deputy Commissioner of Police, Crime Branch, Mumbai in connection with the Bombay Bomb Blasts case. It is not stated in the reply the name of the authority to whom the said letter was addressed. It is not stated that the said letter refers to the impugned order of detention. The order of detention passed against the Petitioner was pending for execution with Bombay Police from the year 1992.

It is very difficult to believe that the concerned Officer who was responsible for execution of the said order was aware in the year 2003 that the order passed against the Petitioner by the Central Government in the year 1992 was pending for execution. Considering the fact that the order of detention was passed twelve years back, it is very difficult to come to the conclusion that when the Petitioner was brought from Dubai to Mumbai, the executing authority was aware that the impugned order passed in the year 1992 was awaiting execution. The description of the letters in Item Nos.42 and 43 does not indicate that there was any reference to order of detention.

30. In so far as the representation made by the Petitioner dated 5th April 2003 is concerned, the same does not refer to impugned order of detention and the same is addressed to Under Secretary of Home Department, Mantralaya, Mumbai. In so far as the first representation dated 17th December 2003 is concerned, the same was addressed to the Principal Secretary of the Home Department, Government of Maharashtra and Senior Inspector of Police, PCB CID, Mumbai. The said representation does not refer to the impugned order of detention. It is the case of the Petitioner that he became aware of the impugned order of detention only when certain documents were served on him along with the order of detention dated 30th January 1996. The first representation of 17th December 2003 is sent to the Principal Secretary of Home Department of State of Maharashtra and to the Senior Inspector of PCB CID, Mumbai. That

representation does not pertain to the impugned order of detention. The second representation dated 17th December 2003 refers to the impugned order of detention. The grievance is made by the Petitioner therein is about the non-execution of the impugned order of detention. The same grievance is made in the application dated 2nd January 2004 made before the designated Court under the TADA Act. Thereafter, there are three representations dated 6th February 2004, 10th February 2004 and 11th March 2004 made by the Petitioner to Respondent No.1. In the representation dated 6th February 2004 a request was made for revoking the order of detention. In the representation dated 10th February 2004 again a request was made for revocation of order of detention. In the representation dated 11th March 2004 a grievance is made that there is no response to the earlier representations and Respondent No.1 was called upon to ensure that the some representative from his office remains present before the designated Court at TADA Act when the application made by the Petitioner is fixed on 18th March 2004. Only the Representation dated 17th December 2003 calls upon the Respondent No.1 to execute the impugned order of detention. It is to be noted here that at that time the order of detention dated 30th January 1996 issued by the State Government and another order passed by the State Government on 28th August 1992 against the Petitioner was pending for execution. The said order dated 28th August 1992 was revoked by the State Government on 27th January 2004. The order dated

30th January 1996 was revoked on 26th December 2003 on the recommendation of the Advisory Board. After the Petitioner succeeded in getting the order of detention dated 28th August 1992 issued by the State of Maharashtra revoked, it appears that the Petitioner changed his stand and on 6th February 2004, he made a representation to the Respondent No.1 for revoking the impugned order of detention. The documents produced by the Additional Solicitor General of India show that the representations made by the Petitioner were considered by the detaining authority. The opinions of the Law Ministry and Home Ministry was sought as the prayer was made by the Petitioner for revocation of order before its execution. After receiving the opinions on 22nd March 2004, a reply was sent on 24th March 2004 informing the Advocate for the Petitioner that three representations were rejected. Immediately, thereafter Criminal Writ Petition came to be filed before Bombay High Court on 7th April 2004 for challenging the impugned order of detention. A case made out by Respondent No.1 is that the Counsel for Union of India in the said Petition informed the Union of India that on 12th April 2004 that the Division Bench of this Court had directed Respondent No.1 to execute the impugned order. Perusal of the record shows that no such order was passed. However, learned Additional Solicitor General has produced before us a copy of the letter sent by the Counsel for Union of India in which it is stated that on 12th April 2004 the Division Bench of this Court directed the Union of India to execute the order. After

fresh application of mind the detaining authority passed an order dated 22nd April 2004 which reflects awareness of the fact that the Petitioner was in Mumbai Central Jail in connection with the Bombay Blasts Case pending before the designated Court under TADA Act and the order was executed on 24th April 2004. Considering all these peculiar events which have taken place, we are of the view that there is no unexplained delay in executing the order. The order of detention remained unexecuted only because the Petitioner ran away from the country and was out of India for more than eleven years. The Petitioner while abroad was involved in Bombay Bomb Blasts case. It is stated in the Affidavit-in-reply that he continued his prejudicial activities outside India. After the Petitioner was brought to Mumbai in connection with the Bomb Blasts case, his initial representation was for calling upon the Authorities to execute the order. Later on he changed his stand and made a representation praying for revocation of the order. The detaining authority obtained opinion of the concerned Ministries and thereafter, rejected the representation. In any event, it cannot be said that the delay in executing the order is due to apathy or indolence on the part of the authorities in executing the order. We are therefore rejecting the contention raised by the learned Counsel for the Petitioner that there was unexplained and inordinate delay in executing the order.

31. In so far as delay in considering the representations dated 6th February 2004, 10th February 2004 and 11th March 2004 is concerned, we have been shown relevant notes made on the file. Considering the fact that one order of detention passed by the State Government was revoked by the State Government itself and the other order was required to be revoked on basis of the opinion of the Advisory Board , the detaining authority sought opinion of the concerned Ministry before deciding the said representations. After receiving the opinions of the Ministries, within two days the detaining authority rejected the representations of the detenu. In the facts of the case we are of view that there was no unreasonable delay in disposal of the representations.

32. Placing reliance on the decision of the Apex Court in the case of **Binod Singh** (supra) the learned Counsel for the Petitioner submitted that the detaining authority has not recorded subjective satisfaction before the executing the order of detention to the effect that there was necessity of executing the order which was passed 12 years back and that the release of the Petitioner on bail was imminent. It is therefore necessary refer to ratio of the Judgment of the Apex Court in case of **Binod Singh** (supra) In the case before Apex Court the detenu was detained under the provisions of National Security Act and the order of detention was passed on 2nd January 1986. There was a murder case pending against the detenu and when the order of detention was passed, the

Petitioner was not in jail. However, before the order of detention could be served on the detenu, the detenu surrendered in the said murder case and was an undertrial prisoner on the date of execution of the order. In the context of the matter, the Apex Court has held in paragraph No.6, which reads thus :

> "6. In this case there were grounds for the passing of the detention order but after that the detenu has surrendered for whatever reasons, therefore the order of detention though justified when it was passed but at the time of the service of the order there was no proper consideration of the fact that the detenu was in custody or that there was any real danger of his release. Nor does it appear that before the service there was consideration of this aspect properly. In the facts and circumstances of this case, therefore, the continued detention of the detenu under the Act is not justified.

In paragraph No.7 the Apex Court proceeded to hold as under:

> 7. It is well settled in our constitutional framework that the power of directing preventive detention given to the appropriate authorities

must be exercised in exceptional cases as contemplated by the various provisions of the different statutes dealing with preventive detention and should be used with great deal of circumspection. There must be awareness of the facts necessitating prevention custody of a person for social defence If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. In the instant case when the actual order of detention was served upon the detenu, the detenu was in jail. There is no indication that this factor or the question that the said detenu might be released or that there was such a possibility of his release, was taken into consideration by the detaining authority properly and seriously before the service of the order. A bald statement is merely an ipse dixit of the officer. If there were cogent materials for thinking that the detenu might be released then these should have been made apparent. Eternal vigilance on the part of the authority charged with both law and order and public order is the price which the democracy in this country extracts from the public officials in order to protect the fundamental freedoms of our citizens. In the affidavits on behalf of the

> detaining authority though there are indications that transfer of the detenu from one prison to another was considered but the need to serve the detention order while he was in custody was not properly considered by the detaining authority in the light of the relevant factors. At least the records of the case do not indicate that. If that is the position, then however disreputable the antecedents of a person might have been without consideration of all the aforesaid relevant factors, the detenu could not have been put into preventive custody. Therefore, though the order of preventive detention when it was passed was not invalid and on relevant considerations, the service of the order was not on proper consideration."

33. At this stage it will be necessary refer to the decision of the Apex Court in **T.P.Moideen Koya** (supra). The Apex Court was dealing with a case where the order of detention was passed against the detenu under COFEPOSA. The order was passed on 22nd January 2002. The detenue absconded and the proceeding under Section 7(1) of COFEPOSA was initiated. The detenu surrendered before the Additional Chief Judicial Magistrate on 4th September 2002 and was taken in custody. The detention order was served upon him in jail on 12 September 2002. The only ground of challenge to the order of

detention was that at the time of passing the detention order the Petitioner was not in custody and at the time of service of detention order he was already in custody and the detaining authority had not applied his mind to the fact whether still there was any necessity to detain the detenu. Reliance was placed on the decision of **T.P.Moideen Koya** (supra) In paragraph No.19, Apex Court held that,

> "19. The very object of passing a detention order being to prevent the person from acting in any manner prejudicial to maintenance of public order or from smuggling goods or dealing in smuggled goods etc., normally there would no requirement or necessity of passing such an order against a person who is already in custody in respect of a criminal offence where there is no immediate possibility of his being released. But in law there is no bar in passing a detention order even against such a person if the detaining authority is subjectively satisfied from the material placed before him that a detention order should be passed...."

The Apex Court referred to the ratio of its earlier decisions in case of **Rameshwar Shaw** (supra) and in case of **Vijaykumar Vs. State of J & K. reported in 1982 (3) SCR page No.522.**

The Apex Court thereafter referred to its decision in case of **Kamarunnissa** (supra) and in paragraph No.13 proceeded to hold that,

> "13. From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released he would in all probability indulged in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after his satisfaction in this behalf, such an order cannot be struck down on that ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question it before a higher Court. What this court stated in the case of Ramesh Yadav, (AIR 1986 SC 315) (supra) was that ordinarily a detention order should not be passed merely to pre-empt or circumvent enlargement on bail in cases which are essentially criminal in nature and can be dealt with under the ordinary

law. It seems to us well settled that even in a case where a person is in custody, if the facts and circumstances of the case so demand, resort can be had to the law of preventive detention. This seems to be quite clear from the case law discussed above and there is no need to refer to the High Court decisions to which our attention was drawn since they do not hold otherwise. We, therefore, find it difficult to accept the contention of the counsel for the petitioner that there was no valid and compelling reason for passing the impugned orders of detention because the detenus were in custody."

After referring to the aforesaid paragraph, the Apex Court in Koya's case proceeded to confirm the order of detention though in that case the detaining authority before the execution of the order had not recorded subjective satisfaction that release of the detenue was imminent. The Apex Court in paragraph No.22 in Koya's case held that,

" A detention order which has been validly passed cannot be rendered invalid on account of the own conduct of the detenu of absconding and evading service."

It is to be borne in mind that in case of **Binod Singh** (supra) the detention order was passed under National Security Act,

1980. We are dealing with a case under COFEPOSA. The Petitioner himself brought about the situation which prevented execution of order of detention. The Petitioner cannot take advantage of his own wrong. The Petitioner avoided execution of impugned order by absconding from India for a period of more that 11 years. In connection with the serial Bombay Bomb Blast case he was brought from Dubai to India in April 2003. After the Petitioner came to know about the order of detention, he made representations praying for revocation of the order. Even before the order was executed, representations were considered by the detaining authority and were rejected. The order dated 22nd April 2004 passed by the detaining authority shows awareness of the fact that the Petitioner was in jail as an undertrial prisoner in serial Bomb Blasts case pending before the TADA Court. The detaining authority has considered the representation and obviously after considering the propensity and potentiality of the detenu rejected the representation made against the order of detention. The detaining authority has shown awareness about changed circumstances by passing order of 22nd April 2004. Following the Judgment of Apex Court in case of **T.P.Moideen Koya** (supra) we are of the view that the detention order is not vitiated.

34. The learned Counsel for the Petitioner has urged that though the order of detention was served on 22nd April 2004, translation of all relevant documents in Urdu language was

furnished to the Petitioner on 21st May 2004 and therefore the right of the Petitioner to make representation was jeopardised. We find that the said contention was not at all raised in the said Petition. As a result, the Respondents had no opportunity to deal with the said contention. Therefore, said submissions of Shri Merchant cannot be considered.

35. Shri Merchant made a grievance regarding non-placement of translation of endorsements on page Nos.47 and 50 which are in Kannada language before the detaining authority. We have perused the relevant pages. Page No.47 is the part of the statement recorded of Abdul Khader under Section 108 of Customs Act, 1962. Page No.50 is also the part of the said statement. We find that the said endorsements are not at all material. The said endorsements could not have affected the subjective satisfaction of the detaining authority in any manner. The next question arises is whether the mandate of Article 22(5) of Constitution of India is defeated as a result of failure to supply translation of the said endorsements in Urdu language to the Petitioner. As stated earlier, the endorsements in Kannada language are on a statements recorded under Section 108 of the Customs Act. The said endorsements are not at all material. The said endorsements are really inconsequential. Therefore, because of non-supply of the translations, the right of making effective representation is affected in no manner.

36. Another grievance of the Petitioner is that the executing authority was aware that the Petitioner was conversant only with Urdu language and therefore it was mandatory that the authority at the time of servicing the order ought to have explained to the detenu in Urdu language the contents of the order, grounds and documents accompanying it. It is contended that as it was not done, fundamental rights of the detenu have been infringed. In this connection, it will be necessary to refer to Affidavit-in-reply of the detaining authority. The detaining authority has stated that after the service of order of detention, representation was made by the Petitioner on 12th May 2004 in English. In paragraph No.12, it is stated that the Petitioner had knowledge of Hindi and English languages. There is no rejoinder filed by the Petitioner denying the said assertion regarding knowledge of English and Hindi languages. In view of this factual position, there is no substance in the said ground of challenge urged by the Petitioner.

37. We have perused the documents at page Nos. 140,141 and 142 which came into existence on 24th March 1992 i.e. a day before the order of detention was passed. The document at page No.140 is the summons issued under Section 108 of Customs Act in prescribed form which runs into one page. The document at page Nos.141 and 142 is Panchnama. The said Panchnama runs into only two pages. After having gone through the documents it is impossible to accept the contention of the Petitioner

that within one day the detaining authority could not have gone through the said documents and appreciated the contents thereof.

38. We, therefore are, unable to interfere with the subjective satisfaction of the detaining authority. There is no merit in the Petition and the same is dismissed. Rule is discharged.

(SMT.RANJANA DESAI,J.)

(ABHAY S. OKA,J.)